72-322 FILE COPY

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-322

The Steam Vessel FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT LINES, INC.,

Petitioners,

—against—

IRON ORE TRANSPORT CO., LTD. as Owner of the Steam Vessel RUTH LAKE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1972

No. _____

The Steam Vessel FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT LINES, INC.,[1]

Petitioners,

—against—

IRON ORE TRANSPORT CO., LTD. as Owner of the Steam Vessel RUTH LAKE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on June 13, 1972.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals printed in Appendix A hereto, *infra,* p. 6a, is reported in F. 2d . The decision of the District Court holding both the s/s Ruth Lake and the s/s Flying Foam

[1]Since the decision of the U. S. Court of Appeals for the Fourth Circuit the name of American Export Isbrandtsen Lines, Inc. was changed to American Export Lines, Inc.

at fault is unreported but is reprinted in the appendix, *infra*, (8a).[2]

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals affirming on the opinion of the District Court was entered on June 13, 1972 (6a).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and 28 U. S. C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. Does the admiralty rule of equal division of damages apply to a collision in which one vessel was guilty of at least five major statutory faults, i.e., she did not maintain a competent lookout, she did not sound fog signals, she proceeded at a clearly immoderate speed of 16 knots in conditions of restricted visibility, she failed to use her radar in the manner prescribed by the annex to the International Rules of the Road (33 U. S. C. § 1094), and she did not have on board radar qualified personnel while the other vessel was guilty of only a minor fault, i.e., speed of 8 knots, slowing to 4 knots?

2. Does 33 U. S. C. § 1090(a) permit the Fourth Circuit Court of Appeals to sanction a rule that a vessel in International Waters must sound a signal when making a course change even if that vessel, though having been seen both on radar and glimpsed visually by the other vessel, has not sighted any vessel, contrary to the holding of the First Circuit Court of Appeals in *Gould* v. *Boston & Philadelphia Steamship Co.*, 55 F. 426 (1 Cir. 1893)?

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[2]Page numbers followed by the letter "a" are references to the corresponding page in the appendix appended hereto.

3. Does 33 U. S. C. § 1077(a) permit the Fourth Circuit Court of Appeals to sanction a rule that a vessel navigating in conditions of restricted visibility must proceed at a slower speed than that which would enable her to be stopped in one-half distance between her and any point along her projected course at which she might collide with any vessel emerging from rain squalls on any course?

STATUTES INVOLVED

The Statutory Provisions involved, all from the International Regulations for Preventing Collisions at Sea, are: 77 Stat. 195, 33 U. S. C. § 1061(c)(ix); 77 Stat. 203, 33 U. S. C. § 1075; 77 Stat. 203, 33 U. S. C. § 1076; 77 Stat. 205, 33 U. S. C. § 1077; 77 Stat. 207, 33 U. S. C. § 1090; 77 Stat. 208, 33 U. S. C. § 1091; 77 Stat. 209, 33 U. S. C. § 1094. They are printed in the appendix, *infra*, pp. 1a to 5a.

STATEMENT OF THE CASE

(a) Basis For Federal Jurisdiction

This action arose out of a marine collision in International Waters between the petitioner's American Steamship Flying Foam and the respondent's British Steamship Ruth Lake off the Virginia coast May 7, 1967. An action was commenced in the United States District Court for the Eastern District of Virginia, Norfolk Division, on June 5, 1967, under the procedures specified in Rule 9(h) of the Federal Rules of Civil Procedure.

(b) The Facts

In the early morning of May 7, 1967, the British Steamship Ruth Lake, bound from Baltimore to Charleston, S. C. in ballast, rammed the lightly loaded American Steamship

Flying Foam bound from San Juan, Puerto Rico, for Norfolk. The Flying Foam was struck in the port quarter in the way of her #5 hatch. There was no cargo damage.

(i) The Flying Foam's Navigation

The Flying Foam, observing all precautions required by law, with a full crew, with her lookout on the forecastle head and with proper equipment on board, was approaching Norfolk. Visibility, while originally good, was steadily worsening and consequently she was sounding fog signals and had twice reduced her speed before sighting the Ruth Lake. Her radar was inoperative but there was no negligence shown in the maintenance nor was the gear that required replacement a spare part that should have been carried on board the vessel. When she sighted the Ruth Lake the Flying Foam had already ordered slow ahead (4 knots). At 12 knots she could have stopped within ½ mile. She had seen the Chesapeake Bay Approach Buoy dead ahead over a mile away and swung right to avoid it.

(ii) The Ruth Lake's Navigation

The Ruth Lake was proceeding in reduced visability, with her lookout on the bridge, at 16 knots, her full speed. This speed was not reduced before sighting the Flying Foam immediately before the collision even though the Flying Foam had been seen on radar at a distance of six miles and even though she had been visually sighted from time to time thereafter. The Ruth Lake was not sounding fog signals; her master or officers had no radar endorsements on their licenses, and they did not observe their own radar after the Flying Foam had closed to three miles.

(iii) The Collision

The Ruth Lake in a heavy rain squall emerged about one-quarter mile from the Flying Foam on the Flying

Foam's port bow. The Flying Foam emerged on the Ruth Lake's starboard bow. Both ships immediately went hard right and reversed. As the Flying Foam bridge crossed the bow of the Ruth Lake, the Flying Foam went hard left and swung her stern almost clear of the Ruth Lake.

REASONS FOR GRANTING THE WRIT

1. The Collision occurred May 7, 1967. The trial was completed June 28, 1968. The opinion of the District Court was handed down September 16, 1971. The case was argued in the United States Court of Appeals for the Fourth Circuit on June 6, 1972. The Court of Appeals decision was rendered June 13, 1972.

The District Court decision, obviously rendered on the record, follows the anachronistic divided damage collision rule whereby if any vessel's fault contributes at all to a collision she is liable for one-half of the damages. This rule long enforced in the United States has resulted in crowding admiralty calendars and making for many additional trials. A vessel primarily at fault will often proceed to litigation bearing in mind that, even if she be operating in thick weather at full speed with untrained personnel and without blowing fog signals, she may be lucky enough to obtain a both-to-blame result from one minor infraction by the other vessel. Such a rule subsidizes litigation.

While the one-half damage rule is now law in the United States, this Court has granted certiorari in *Union Oil Company of California* v. *Tug Boat San Jacinto,* 304 F. Supp. 519 (Or. 1969), mod'd, 451 F. 2d 1369 (9 Cir. 1971), cert. granted, 405 U. S. 954 (1972), a case in which the factual situation exactly parallels that in this case. It is expected that one issue with which this Court will deal and, possibly will modify, is the admiralty rule of equal division of damages as applied to a collision in which

one vessel has been flagrantly negligent while the other vessel may have committed only a minor statutory infraction.

It is hoped that the equal division of damages rule which has worked so many harsh injustices in the area of international commerce will be modified beyond the slight modification brought about through the major-minor fault doctrine.

2. The District Court and the Court of Appeals ignored the statutory requirement that the international rules require change of course signals only when the vessels are in sight of each other. The testimony of both vessels is clear that, when the Flying Foam changed course to avoid striking the buoy, she could not see the Ruth Lake, and the Ruth Lake could not see her.

The District Court found the Flying Foam guilty for the failure of the Flying Foam to signal a course change made at 0242 at which time Flying Foam had no vessel within sight. The District Court opinion cites no authority in support of this interpretation of 33 U. S. C. 1090(a), which, in pertinent portion, reads:

> "(a) When vessels are in sight of one another, a power driven vessel underway in taking any course authorized . . . shall indicate that course by the following signals on her whistle . . ." (3a).

The District Court's finding is faulty not only in light of the above statute's clear language, but is in direct conflict with the interpretation of this rule made by the First Circuit Court of Appeals:

> "By that article a steamship underway has permission—only permission—to employ the signals therein named for communication with 'a ship which

> he has in sight.' They are not signals allowed in a fog, or other state of the atmosphere, when sight is cut off. Absolute knowledge of the relative positions of the vessel, such as sight only can convey, is a prerequisite to their use." *Gould* v. *Boston & Philadelphia Steamship Co.*, 55 F. 426, 432 (1 Cir. 1893).

Not only has research uncovered no decision of this Court which interprets 33 U. S. C. 1090 (a), but the same sighting requirement has been kept in the Revision of the Regulations for Preventing Collisions at Sea drafted by the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization, an affiliate of the United Nations, and is under consideration by the Maritime Safety Council of the United States Coast Guard (Rule 47).[3] In addition, it should be noted that 33 U. S. C. § 1061 (c) (ix) defines "in sight of one another" as when one vessel can be observed "visually" from the other (1a).

3. The Flying Foam was proceeding at such a speed that she could stop within one-half mile, and after reviewing her expert's testimony even the Ruth Lake conceded in her brief to the Court of Appeals that the Flying Foam sighted the buoy a "little more than a mile away." Nevertheless, the District Court stated the speed of the Flying Foam was improper since she did not observe the Ruth Lake before the Ruth Lake emerged out of a rain squall off to port at a distance of ¼ mile. How the Flying Foam could have known the visibility was reduced off her port bow but not straight ahead was never explained.

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[3]Maritime Safety Committee (25th Session) of the Intergovernmental Maritime Consultative Organization, Rule 47 (a), Document MSC XXV/3 (b)/1, dated 10 February 1972, Safety of Navigation, Revision of the Regulations for Preventing Collisions at Sea (see Appendix C, 19a).

... Assuming *arguendo* that the finding of the District Court that the Flying Foam was traveling at an excessive speed has some basis, which it does not, the affirmance by the Fourth Circuit Court of Appeals of the District Court decision is in conflict with the decision of the First Circuit Court of Appeals in *Gertrude Parker, Inc.* v. *Abrams,* 178 F. 2d 259 (1 Cir. 1949).

Gertrude Parker, supra, involved a collision on the open sea under conditions of restricted visibility, i.e., approximately 25 to 65 yards visibility. The Skilligolee had commenced her trip at 0430 hours at a speed of 8 to 9 knots but, at 0930 hours, encountered heavy fog and reduced speed to 5 or 6 knots and commenced sounding fog signals. She had a lookout posted on her bow and her navigation lights were lit and in order. The Gertrude Parker had maintained her full cruising speed of 8 to 9 knots at all pertinent times even though she had encountered fog approximately one-half hour before the time of the collision, and, in addition, there was a finding by the District Court that she had not sounded fog signals.

On appeal, the Gertrude Parker conceded its fault but made several contentions regarding alleged faults of the Skilligolee, the most substantial of which dealt with the speed of the Skilligolee.

The Court conceded that the Skilligolee "even at her reduced speed, could not be stopped in her share of the visible distance ahead . . . but this does not conclusively establish that her speed was immoderate."

> "The 'visible distance' test of moderate speed under the Rule, although useful in many situations, and frequently applicable, is not a universal one to be applied blindly." *Gertrude Parker, supra,* at p. 264.

In *Gertrude Parker, supra,* not only did the First Circuit recognize that the visible distance test is a flexible one but also acknowledged that the major-minor fault doctrine can be applied in circumstances involving possible immoderate speed where a collision is apparently caused by the overwhelming fault of one vessel:

> "Moreover, since the Gertrude Parker's conceded faults were gross, we are not called upon to scrutinize the Skilligolee's minutely, or to draw doubtful inferences against her, to discover if she also may not have been at fault [citations omitted]" (at p. 264).

It is undisputed that the Ruth Lake did not have a lookout stationed at her bow, failed to reduce her speed from 16 knots in conditions of restricted visibility and failed to sound fog signals at any time—precisely the faults which the *Gertrude Parker* either conceded or was found guilty of.

Thus, in accordance with the *Gertrude Parker, supra,* decision, it was clearly erroneous for the Fourth Circuit Court of Appeals to affirm the District Court's opinion in which the District Court scrutinized the Flying Foam's conduct "minutely" and drew "doubtful inferences against her, to discover if she also may not have been at fault." *Gertrude Parker, supra,* at p. 264. The Fourt Circuit Court of Appeals permitted to stand a decision in direct conflict with the *Gertrude Parker, supra,* decision.

This Court recently granted certiorari in *Union Oil Company of California* v. *Tugboat San Jacinto, supra,* where the Court of Appeals had reversed a finding of sole fault in the District Court on the grounds that a vessel proceeding slowly and cautiously in the fog was nevertheless at fault for excessive speed. This, as stated above, is parallel to the situation here.

4. In an apparent effort to relieve the maritime doctrine of equally divided damages for joint fault in collision of its often harsh and unjustifiable effect, this Court has often applied the "major-minor fault doctrine:"

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least at first to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." *The City of New York,* 147 U. S. 72, 85 (1893).

And this Court, in *The Victory & The Plymothian,* 168 U. S. 410, 423 (1897), elaborated somewhat on the quantity of evidence necessary to establish fault on the part of a vessel whose fault was slight or a non-contributing factor:

> "As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment."

The faults of commission and omission of the Ruth Lake were gross and inexcusable.

Thus the Ruth Lake violated 33 U. S. C. 1077 (a) by steaming at her full sea speed in conditions of restricted visibility, since, at that speed, she needed at least six minutes to stop.

The Ruth Lake violated 33 U. S. C. 1076 (a) (b) (c) (i) by failing to sound fog signals since she was navigating under conditions of restricted visibility.

The Ruth Lake violated 33 U. S. C. 1091 by failing to maintain a proper lookout i.e. a lookout on the bow. *Anthony* v. *International Paper Company,* 289 F. 2d 574 (4 Cir. 1961). *The Vedamore,* 137 F. 844 (4 Cir. 1905).

The Ruth Lake violated 33 U. S. C. 1094 (1) (2) in that her Captain and Mate made assumptions based on scanty information from their radar scope, in that they ignored radar indications of one or more vessels in the vicinity which "may mean that 'moderate speed' should be slower than a mariner without radar might consider moderate in the circumstances." 33 U. S. C. 1094 (2). It should also be pointed out that the previously referred to Revision of the Regulations for Preventing Collision at Sea under consideration by the Marine Safety Council provide that one factor to be taken into consideration when determining "safe speed" is the "proper use of radar to assess risk of collision."[4] The Ruth Lake fell far short of meeting this requirement.

Under this Court's decisions in *The City of New York, supra,* and in *The Victory & The Plymothian, supra,* the gross faults of the Ruth Lake made her solely responsible for the collision and the Court of Appeals affirmance of the District Court's decision to the contrary is in conflict with these decisions.

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[4]Maritime Safety Committee, *supra* note 3, Rule 7 (b) (ii) (see Appendix C, 19a).

CONCLUSION

FOR THE FOREGOING REASONS IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI HEREIN BE GRANTED.

Dated: August 24, 1972.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Title 33 of United States Code (1970)—Navigation and Navigable Waters
Chapter 21—International Regulations for Preventing Collisions at Sea

77 Stat. 195 (1963), 33 U. S. C. § 1061(c)(ix) (1970)

Scope of sections 1061 to 1904 (Rule 1).

* * *

(c) Definitions.

In sections 1061 to 1094 of this title, except where the context otherwise requires—

* * *

(ix) vessels shall be deemed to be in sight of one another only when one can be observed visually from the other;

77 Stat. 203 (1963), 33 U. S. C. § 1075 (1970)

General considerations of radar.

1. The possession of information obtained from radar does not relieve any vessel of the obligation of conforming strictly with sections 1061 to 1094 of this title and, in particular, the obligations contained in sections 1076 and 1077 of this title.

2. The Annex to the Rules contains recommendations intended to assist in the use of radar as an aid to avoiding collision in restricted visibility.

77 Stat. 203 (1963), 33 U. S. C. § 1076 (1970)

Sound signals (Rule 15).

(a) Power-driven, and sailing vessels.

A power-driven vessel of 40 feet or more in length shall be provided with an efficient whistle, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn to be sounded by mechanical means, and also with an efficient bell. A sailing vessel of 40 feet or more in length shall be provided with a similar fog horn and bell.

(b) Methods of sending.

All signals prescribed in this section for vessels under way shall be given—

(i) by power-driven vessels on the whistle;

(ii) by sailing vessels on the fog horn;

(iii) by vessels towed on the whistle or fog horn.

(c) Number and length of blasts and rings.

In fog, mist, falling snow, heavy rainstorms, or any other condition similarly restricting visibility, whether by day or night, the signals prescribed in this section shall be used as follows—

(i) A power-driven vessel making way through the water shall sound at intervals of not more than 2 minutes a prolonged blast.

* * *

77 Stat. 205 (1963), 33 U. S. C. § 1077 (1970)

Speed in weather restricting visibility (Rule 16).

(a) Every vessel, or seaplane when taxi-ing on the water, shall, in fog, mist, falling snow, heavy rainstorms or any other condition similarly restricting visibility, go at

a moderate speed, having careful regard to the existing circumstances and conditions.

(b) A power-driven vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, go far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

(c) A power-driven vessel which detects the presence of another vessel forward of her beam before hearing her fog signal or sighting her visually may take early and substantial action to avoid a close quarters situation but, if this cannot be avoided, she shall, so far as the circumstances of the case admit, stop her engines in proper time to avoid collission and then navigate with caution until danger of collision is over.

77 Stat. 207 (1963), 33 U. S. C. § 1090 (1970)

Sound signals indicating course (Rule 28).

(a) Meaning of blasts.

When vessels are in sight of one another, a power-driven vessel under way, in taking any course authorised or required by sections 1061 to 1094 of this title, shall indicate that course by the following signals on her whistle, namely—

One short blast to mean "I am altering my course to starboard".

Two short blasts to mean "I am altering my course to port".

Three short blasts to mean "My engines are going astern".

* * *

77 Stat. 208 (1963), 33 U. S. C. § 1091 (1970)

Usual additional precautions required generally (Rule 29).

Nothing in sections 1061 to 1094 of this title shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

77 Stat. 209 (1963), 33 U. S. C. § 1094 (1970)

Other general considerations.

Assumptions to be avoided.

(1) Assumptions made on scanty information may be dangerous and should be avoided.

Radar navigation; moderate speed; limitations of radar.

(2) A vessel navigating with the aid of radar in restricted visibility must, in compliance with section 1077(a) of this title, go at a moderate speed. Information obtained from the use of radar is one of the circumstances to be taken into account when determining moderate speed. In this regard it must be recognised that small vessels, small icebergs and similar floating objects may not be detected by radar. Radar indications of one or more vessels in the vicinity may mean that "moderate speed" should be slower than a mariner without radar might consider moderate in the circumstances.

Same; duty to stop.

(3) When navigating in restricted visibility the radar range and bearing alone do not constitute ascertainment of the position of the other vessel under section 1077(b) of this title sufficiently to relieve a vessel of the duty to stop her engines and navigate with caution when a fog signal is heard forward of the beam.

Close quarters; circumstances to guide alterations of course or speed.

(4) When action has been taken under section 1077(c) of this title to avoid a close quarters situation, it is essential to make sure that such action is having the desired effect. Alterations of course or speed or both are matters as to which the mariner must be guided by the circumstances of the case.

Close quarters; alteration of course to avoid.

(5) Alteration of course alone may be the most effective action to avoid close quarters provided that—

(a) There is sufficient sea room.

(b) It is made in good time.

(c) It is substantial. A succession of small alterations of course should be avoided.

(d) It does not result in a close quarters situation with other vessels.

Alteration of course; circumstances to guide direction; general preference for alteration to starboard.

(6) The direction of an alteration of course is a matter in which the mariner must be guided by the circumstances of the case. An alteration to starboard, particularly when vessels are approaching apparently on opposite or nearly opposite courses, is generally preferable to an alteration to port.

* * *

APPENDIX B

Opinion of the Court of Appeals

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 72-1185

IRON ORE TRANSPORT CO., LTD, as Owner of the Steam Vessel RUTH LAKE,

Appellee,

v.

The Steam Vessel FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Appellants.

No. 72-1186

IRON ORE TRANSPORT CO., LTD., as Owner of the Steam Vessel RUTH LAKE,

Appellant,

v.

The Steam Vessell FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffman, Chief Judge.

AFFIRMED

(Argued June 6, 1972. Decided June 13, 1972.)

Before BUTZNER, RUSSELL, and FIELD, Circuit Judges.

Robert M. Hughes, III (James M. Estabrook, Hollis M. Walker, Jr., Richard A. Corwin, Seawall, McCoy, Winston & Dalton, and Haight, Gardner, Poor & Havens, on brief) for the Steam Vessel FLYING FOAM and American Export Isbrandtsen Lines, Inc.; Guilford D. Ware (Francis N. Crenshaw and Crenshaw, Ware & Johnson, on brief) for Iron Ore Transport Co., Ltd., as Owner of the Steam Vessel RUTH LAKE.

Appendix B

PER CURIAM:

This appeal arises out of the collision between the freighters RUTH LAKE and FLYING FOAM off the Virginia coast. The district court found both vessels at fault and decreed the division of damages. Upon consideration of the briefs, record and argument, we affirm on the opinion of the district court. Iron Ore Transport Co., Ltd. v. The Steam Vessel FLYING FOAM, Civ. No. 6219 (E. D. Va. 1971).

Opinion of the District Court

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IRON ORE TRANSPORT CO., LTD., As Owner of the Steam Vessel RUTH LAKE,
Plaintiff,

v.

The Steam Vessel FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
Defendants.

Civil Action No. 6219

MEMORANDUM

This controversy involves a collision between the RUTH LAKE, owned and operated by Iron Ore Transport Co., Ltd. and the FLYING FOAM, owned and operated by American Export Isbrandtsen Lines, Inc., which occurred on May 7, 1967, at approximately 0246 E.D.S.T. in the international waters off the coast of Virginia. The RUTH LAKE departed Baltimore in ballast on the afternoon of May 6, 1967, bound for Charleston, South Carolina. She had picked up a Chesapeake Bay pilot who left the vessel at approximately 0203 on May 7, 1967, at the pilot ship. She commenced her sea voyage at about 0230. The FLYING FOAM departed San Juan, Puerto Rico, on May 4, 1967, bound for Norfolk, Virginia. She was inbound at the time of collision, with the RUTH LAKE being outbound.

We hold, for reasons stated herein, that there was mutual fault on the part of the two vessels. Damages will accordingly be divided.

The RUTH LAKE is a large ore carrier of 21,156 gross tons[1], with a length of 661 feet and a beam of 87 feet. When she proceeded outbound via Chesapeake Bay, there was light rain. The gyro compass was on but it had an easterly error of 5 degrees. The captain took the conn after the statutory pilot left the ship. Visibility was estimated by one witness at from 4 to 5 miles, and by another witness at 5 to 7 miles, in rain, the calculation of the latter estimate being at 0207. Captain Yung Ling, the master of the RUTH LAKE, had a Canadian master's license but no radar endorsement. The mate on watch, Shiau, likewise had no endorsement on his license and had never taken a training course.

At 0211 full speed of 16 knots was ordered. At 0220 the lookout was called back from the bow and stationed on the wing of the bridge, a distance of 225.5 feet farther aft. At 0230 the RUTH LANE commenced her sea voyage. The mate on watch checked to see if cross bearings could be used, but found that the rain had impaired visibility to an estimated 3 miles. The mate proceeded to the chart room to fix the ship's position and gave the order to secure one or the steering motors.

At 0220 the lookout spotted one white light. At 0232 he reported spotting lights on the starboard bow, but the master was unable to make a visual sighting as the rain

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[1]Captain Ling testifies that the gross tonnage was 21,156.14. The post-trial brief of the RUTH LAKE refers to 31,157 gross tons. While we deem the point immaterial, we accept Captain Ling's testimony and assume that counsel are in error.

had obscured his vision. Radar observation put the observed ship at a range of 6 miles.

The master of the RUTH LAKE estimated that, at approximately 0237, the white lights of the approaching vessel (later discovered to be the FLYING FOAM) were spotted visually by the mate who saw two white lights with his binoculars, but again the captain could not locate the lights as they had disappeared. Radar at this time put the distance at 3 miles on the starboard bow of the RUTH LAKE.

The captain of the RUTH LAKE was of the opinion that the bearing of the approaching vessel was changing to the starboard of the RUTH LAKE, and that there was no danger of a collision. The mate reported that the bearing was opening. The rain increased, but no plots were made of the course of the vessel sighted on radar. Only relative bearings at 6 and 3 miles were obtained, and the master of the RUTH LAKE did not again look at the radar after sighting the other vessel at 3 miles. The master did not put the RUTH LAKE on automatic pilot as he wanted to clear the other vessel before switching off manual control.

At no time did the RUTH LAKE blow any fog signals; nor did she hear any such signal although the lookout reported fog and bad weather.

The FLYING FOAM, under command of Captain Friend, had a draft of 11′ 2″ forward and 15′ 10″ aft. While she had 659 long tons of general cargo aboard, this was considered a "light condition" for this vessel, it being a standard C-3 freighter of 492 feet in length with a beam of 69 feet, and of 7,821 gross tons. There was a full watch set, including an officer, quartermaster, lookout on the bow, and various engine room personnel. In accordance with previous instructions, the master had been called at 0115.

The radar on the FLYING FOAM was inoperative and could not be repaired on board. The part required to correct the defect was not customarily carried at sea. The fathometer had been inoperative at least since December, 1966, when Captain Friend came aboard.

There was an area of disagreement regarding estimates of visibility among those standing watch aboard the FLYING FOAM. This is based on the fact that there were no objects in sight and the fog was rolling in and out in banks.

Landfall was made at 2253 on May 6 when the Bodie Island Light was sighted at approximately 19.6 mines. Between midnight and 0100 on May 7 the lookout and helmsman reported sighting at least one and perhaps two ships. At 0100 McGovern took the lookout watch on the bow. Anderson, the third mate, sighted Currituck Light at 0103 at 10 to 11 miles with binoculars, with visibility on ships at 6 to 7 miles. After the captain was called at 0115 a buoy was spotted at about 0120. At 0136 the FLYING FOAM had False Cape Buoy 4A about 1000 feet abeam. Rain and fog began at this time and visibility on shore lights was estimated at 6 to 7 miles. The FLYING FOAM changed course at this time to 341 degrees to stay to seaward of buoy 2CB, then approximately 17 miles away. At 0215 the vessel altered her course to 345 degrees.

The third mate, Anderson, testified that no buoy was reported or seen between 0136 and the sighting of buoy 2CB. McGovern, the lookout, states that he saw a flashing red buoy shortly after sighting the False Cape buoy. There is a wreck buoy between False Cape and 2CB, which is apparently what McGovern observed. By 0200 the fog was getting heavier and banks were rolling in and out.

At 0224 a rought bearing was taken by radio but there was considerable interference. At 0230 the FLYING FOAM commenced blowing fog signals by hand. Visibility was reduced, according to the third mate, with a glow around the lights. The lookout gave a low estimate of visibility at from one to one and one-half miles.

The order was given to reduce to full ahead maneuvering speed of 12 knots at either 0230 or 0232. Shore lights were no longer visible. The master estimated visibility at 3 to 4 miles. At 0237 the FLYING FOAM did not know her position. The helmsman suggested that visibility worsened after 0232, but he was not sure of this statement. There was no navigational aid to assist in judging visibility, but the usual visibility of buoy 2CB was 5 miles with no fog. Just prior to sighting buoy 2CB at 0242, the mate was sent to the chart room to fix a position by radio bearing. This was the only time he went to the chart room after 0200, but the master went there at 0230 to estimate when buoy 2CB should be sighted.

When buoy 2CB was sighted at 0242, the master said it was "a mile or so dead ahead." The mate declined to make an estimate. The lookout calculated one-quarter of a mile. Fog was very thick at the time.

Captain Friend gave the order to bring the vessel hard right from 345° to 005° at 0242 to pass buoy 2CB to port. No signal was sounded by the FLYING FOAM to indicate the navigational change, and no vessel had been sighted by the FLYING FOAM at the time. At 0245 the order was given to reduce speed to slow ahead, about 4 knots. Within the intervening minute the RUTH LAKE was observed close ahead to port at one-quarter of a mile. The lookout expressed the view that the RUTH LAKE and buoy 2CB were seen at almost the same time and at about the same one-

quarter of a mile from the FLYING FOAM, with the RUTH LAKE slightly inboard of the buoy.

Obviously, at this time, the ships were *in extremis* and measures taken by the vessels to avoid the collision are largely immaterial. There is no contention by either party that liability should attach by reason of faulty emergency procedures at this point. The RUTH LAKE collided with the port quarter of the FLYING FOAM in the area of the after end of her No. 5 hold and steering engine room.

When the collision occurred at 0246 the speed of the FLYING FOAM was estimated at 8 knots. Her stopping distance at 12 knots is one-half mile according to tests run under similar conditions after the collision. The stopping distance of the RUTH LAKE is more difficult to determine. She travels through the water approximately seven-tenths of a mile in 3 minutes while proceeding at full speed. At a steady rate of deceleration, the RUTH LAKE would stop in three-fourths of a mile in 6 minutes. The RUTH LAKE at no time decreased her speed from 16 knots until the vessels were *in extremis.*

Buoy 2CB is a flashing white light powered by 200 candle power at an average height of 15 feet above water. It is the largest type buoy in use, being 9 feet in diameter and 38 feet in length, equipped with a radar reflector attached to it. It is known as the Chesapeake Bay approach buoy as it marks the focal point for all deep-draft vessels entering or leaving Chestpeake Bay or Hampton Roads. It is the "Times Square of the South" and is acknowledged to be located in the area of heavy water traffic.

We have no difficulty in condemning both vessels under the circumstances of this case. Captain Friend of the FLYING FOAM admitted knowledge of the fact that he was coming into "restricted waters," by which he meant where

there was "a lot of traffic." With limited visibility and an inoperable radar and fathometer, and with no assurance of his position until 4 minutes prior to the collision, he proceeded at full speed. His reduction of speed to slow ahead at 0245 had very little effect upon the speed insofar as it related to the collision. In *Villain & Fassio E. Compagnia* v. *Tank Steamer E. W. Sinclair,* 313 F. 2d 722, 723 (2 Cir. 1963), the court condemned a speed of 11½ knots under somewhat similar circumstances, although visibility was perhaps more limited, where it said:

> "The SINCLAIR was plainly guilty of faulty navigation in proceeding into heavy fog with visibility of rarely more than half her length, with her radar out of order, in and near a heavily traveled channel, at so high a speed."

While the facts in *United States* v. *M/V Werttemberg,* 330 F. 2d 498 (4 Cir. 1964), are quite different, the language of Judge (now Chief Judge) Haynsworth seems peculiarly appropriate where he said (p. 503):

> "The pilot had every reason to realize that visibility was tremendously reduced, and that, without radar, he was proceeding blindly into a situation which might call for close passage with other outbound vessels. That he did not go to slow ahead or take other precaution, when he had abundant reason to believe that visibility had been reduced to the danger point, warranted the District Court's conclusion of fault on the part of Werttemberg. The original reduction of speed to half ahead may not have been incautious if taken early enough, but when the landmarks could not be seen when the Werttemberg

had approached to within less than one mile of them, further action was required."

Under normal visibility buoy 2CB would have been sighted at approximately 0221. As noted above, the buoy was finally sighted at 0242—21 minutes later—and then to the starboard and not off the port bow. This is what prompted Captain Friend to give a hard right order at 0242.

In the landmark case of *British Transport Commission* v. *United States*, 230 F. 2d 139 (1956), affd. 354 U. S. 129 (1957), the appellate courts accepted a finding by the district judge, 131 F. Supp. 712, 715, where he said:

> "The DUKE was running through a 'patchy' fog—'very thick at times' and then fairly clear intervals. She was piercing one fog bank after another . . . From 3 A. M. on, the fog was 'very thick' . . . In such weather the speed of the DUKE OF YORK was too fast for good seamanship; it violated the 'moderate speed' injunction in the fog rules of Article 16, International Rules, 33 U. S. C. A. § 145N. It was an overriding and major fault; collision was a foreseeable result . . . At 0412 and up to the collision, visibility was ¼ mile, the captain, his mate and lookout have said, and even in this interval the speed was 12 knots, half ahead. Not until the HAITI VICTORY was sighted, the ships ¼ mile apart, and the collision a minute or two off, did the engines go to slow, 6 knots."

What has been said with respect to the fault of the FLYING FOAM is equally applicable to the RUTH LAKE. Both vessels approached a point of heavy traffic at too great a speed under the circumbstances here prevailing.

While the RUTH LAKE argues that the FLYING FOAM is solely at fault by reason of the order to go hard right to pass buoy 2CB to port, we cannot agree that this was the only major fault involved. In *Standard Oil Company of California* v. *S.S. Rotti*, 286 F. Supp. 677 (N. D. Cal. 1967), aff'd. *per curiam sub. nom. N.V. Stoomvaart Maatschappij "Nederland" and the S.S. Rotti* v. *Standard Oil Company of California*, adopting the opinion of the district court, 398 F. 2d 835 (9 Cir. 1968), cert. den. 393 U. S. 980 (1968), the situation confronting the S.S. ROTTI was virtually identical with that of the RUTH LAKE, the only material difference being that the vessel in collision with the ROTTI conceded its fault. Indeed, the ROTTI had even stronger grounds that the RUTH LAKE in urging that she acted prudently. Without detailing the facts in ROTTI, it is sufficient to state that, after knowledge that another vessel was outbound and the ROTTI inbound and having seen the vessel on her rader, she proceeded at an immoderate speed in a fog situation in violation of Rule 16(a) of the International Rules for Preventing Collisions at Sea. The condemned speed of the ROTTI was 12 knots; the speed of the RUTH LAKE was 16 knots, and she was admitting not sounding any fog signals. The RUTH LAKE has not overcome the heavy burden imposed by the rule in THE PENNSYLVANIA, 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148 (1873), occasioned by the statutory faults of immoderate speed and no fog signals. Equally at fault was the FLYING FOAM with no operative radar and no knowledge as to her whereabouts until 0242—4 minutes prior to the collision—when she sighted buoy 2CB "a mile or so dead ahead" or perhaps only one-quarter of a mile as estimated by the lookout. It was at this point that the FLYING FOAM altered her course to starboard in order to pass the buoy to port. She

was then proceeding at 12 knots and it was not until one minute prior to the collision that an order was given to reduce speed to slow ahead, about 4 knots. What has been said as to the speed of the RUTH LAKE applies with equal force to the FLYING FOAM.

We do not believe that the major-minor fault rule as enunciated in the *City of New York*, 147 U. S. 72, 85 (1893), can be invoked by either vessel. As indicated by THE VICTORY & THE PLYMOTHIAN, 168 U. S. 410, 424 (1897), the determination of this issue is frequently a close question because subsequent knowledge of what might have prevented disaster tends to qualify the inquiry as to the prior duty to avert it. However, with respect to the RUTH LAKE and FLYING FOAM, we see no element of closeness. Both vessels were guilty of major faults.

We see no need to enter into any discussion of the failure of the RUTH LAKE to use her radar intelligently by plotting the course of the other vessel, although it would have been prudent to do so. It appears that, even without the course change by the FLYING FOAM, the crossing of the vessels would have been dangerously close, and it does not follow that the collision could necessarily have been averted to the extent of exonerating the RUTH LAKE from faulty navigation. We should also note that, at 0220, the lookout was called back from the bow of the RUTH LAKE and stationed on the wing of the bridge. Perhaps he could see better, and perhaps he could not, but at least he was 225 feet farther aft. These factors we would mention in detail if the controlling decision rested upon either point. However, with respect to the RUTH LAKE, we prefer to rest the judgment on immoderate speed and no fog signals, all with knowledge of the fact that another vessel was in the area of heavy water traffic. The fault of

the FLYING FOAM is obviously clear in that, although fog signals were sounded, the speed was excessive with no operable radar, fog, and limited visibility, combined with a course change only 4 minutes prior to the collision, which change was not accompanied by any signal.

We know, of course, that the "visible distance" rule of "moderate speed" should not be applied blindly, but where there is knowledge, either actual or constructive, of the presence of other vessels in the vicinity—actual knowledge of the RUTH LAKE and constructive knowledge of the FLYING FOAM—with the limited visibility here shown, the speed may well be immoderate regardless of whether the "visible distance" test of moderate speed is applicable or not. *Gertrude Parker, Inc.* v. *Abrams,* 178 F. 2d 259, 264 (1 Cir. 1949).

A decree may be presented dividing the damages and referring the matter to a commissioner for an appropriate reference, allowing a reasonable time, not exceeding 120 days for the parties to attempt to agree upon the total damage.

(Signed) WALTER J. HOFFMAN
United States District Judge

Norfolk, Virginia
September 16, 1971

APPENDIX C

Miscellaneous

Maritime Safety Committee (25th Session) of the Inter-Governmental Maritime Consultative Organization, Document MSC XXV/3(b)/1, dated 10 February 1972—Safety of Navigation; Revision of the Regulations for Preventing Collisions at Sea.

Rule 7—Safe Speed

Every vessel shall at all times proceed at a safe speed. In determining safe speed the following factors shall be taken into account:

(a) For all vessels:

(i) the state of the visibility;

(ii) the prevailing state of wind, sea and current;

(iii) the traffic density including concentrations of fishing vessels or any other vessels;

(iv) the proximity of navigational hazards;

(v) the manoeuverability with special reference to stopping distance and turning ability in the prevailing conditions.

(b) For vessels with operational radar:

(i) the characteristics, efficiency and limitations of the radar;

(ii) the proper use of radar to assess risk of collision;

(iii) the effect of the state of the sea and weather and other sources of interference on radar detection;

(iv) the possibility that small vessels, ice and oth floating objects may not be detected by radar an adequate range;

(v) that radar indications of one or more vessels the vicinity, in conditions of restricted visibili may mean that "safe speed" should be slow than a mariner without radar might consid safe in the circumstances;

(vi) any constraints imposed by the radar range sca used.

Rule 47—Manoeuvering signals

(a) When vessels are in sight of one another, a power driven vessel under way, in taking any course autho ized or required by these Rules, shall indicate th course by the following signals on her whistl namely:

—one short blast to mean "I am altering my cours to starboard";

—two short blasts to mean "I am altering my cours to port";

—three short blasts to mean "I am operating astern propulsion".

* * *

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QUESTION 1

Should Certiorari be granted in this case when:

1. The District Court found factually that both vessels were guilty of major faults which contributed to the collision, which findings of fact were affirmed *per curiam* by the Court of Appeals for the Fourth Circuit. 1
2. The primary reason for granting the writ advanced by petitioners is that the case is similar to *Union Oil Co. of California* v. *Tugboat San Jacinto* (in which *certiorari* was granted, No. 71,900). 1
3. *Certiorari* was granted in the *Union Oil* case to resolve a conflict between Circuits as to the application of the half distance rule for determining moderate speed in reduced visibility. 2
4. This case does not depend on the application of the half distance rule for the establishment of major faults on petitioner's vessel, the FLYING FOAM. 2
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-322

The Steam Vessel FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT LINES, INC.,

Petitioners,

—against—

IRON ORE TRANSPORT CO., LTD., as Owner of the Steam Vessel RUTH LAKE,

Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION

Should *certiorari* be granted in this case when:

1. The District Court found factually that both vessels were guilty of major faults which contributed to the collision, which findings of fact were affirmed *per curiam* by the Court of Appeals for the Fourth Circuit.

2. The primary reason for granting the writ advanced by petitioners is that the case is similar to *Union Oil Co. of California* v. *Tugboat San Jacinto* (in which *certiorari* was granted, No. 71-900).

3. *Certiorari* was granted in the Union Oil case to resolve a conflict between Circuits as to the application of the half distance rule for determining moderate speed in reduced visibility.

4. This case does not depend on the application of the half distance rule for the establishment of major faults on petitioner's vessel, the FLYING FOAM.

5. This case does not involve any special or unusual features warranting *certiorari.*

STATEMENT OF THE CASE

The case results from a collision between two vessels, one – the RUTH LAKE – outbound from the Virginia Capes, and the other – the FLYING FOAM – inbound. The trial court found both vessels guilty of major faults contributing to the collision and divided the damages equally. The Court of Appeals affirmed *per curiam.*

Petitioner now seeks a writ on the contention that there are two elements in this case which are also present in *Union Oil Co. of California* v. *Tugboat San Jacinto*, 304 F. Supp. 519 (Or. 1969), mod'd. 451 F. 2d 1369 (9 Cir. 1971), cert. granted, 405 U.S. 954 (1972), in which *certiorari* has been granted. In *Union Oil*, the trial court held the tugboat SAN JACINTO solely at fault because she failed to see the tanker, SANTA MARIA, and changed course right across her bow. (This is similar to the action of the petitioner's vessel, the FLYING FOAM, in this case in that she changed course across the bow of the RUTH LAKE.) The Court of Appeals reversed, agreeing that the SAN JACINTO was at fault, but also finding the tanker at fault for proceeding through or in vicinity of fog at a speed greater than that at which she could stop within one-half of her visibility. Thus the half-distance rule enunciated in *The Silver Palm*, 94 F. 2d 754, 757 (CCA9, 1937) was involved. Because both vessels by necessity were held at fault, the long established admiralty doctrine of an equal division of damages in mutual fault cases was also invoked.

The decision in *Union Oil* pointed up a conflict between two Circuits on the half-distance rule, because the Fifth Circuit recently ruled in *Hess Shipping Co.* v. *SS Charles Lykes*, 417 F. 2d 346 (5th Cir. 1969) that "moderate speed" as required by the Rules was a relative concept and should not be restricted to the rigid framework of a stopping distance which does not exceed one-half the visibility.

The granting of *certiorari* in *Union Oil* to resolve the inter-circuit conflict in interpreting the application of the half-distance rule, is not a basis for granting *certiorari* in this case because the violation of the half-distance rule is only one of several major faults committed by the petitioner's vessel, FLYING FOAM.

The collision in this case occurred at Cape Henry, Virginia, one-half a mile south of the Chesapeake Bay entrance Buoy 2CB at 0246 (2:46 A.M., E.D.T.), on May 7, 1967. Buoy 2CB "is known as the Chesapeake Bay approach buoy as it marks the focal point for all deep draft vessels entering or leaving Chesapeake Bay or Hampton Roads. It is the 'Times Square of the South' and is acknowledged to be located in the area of heavy water traffic." (p. 18a)* The accident happened when the inbound steam vessel FLYING FOAM, without any signal, turned across the outbound shipping lane in front of the RUTH LAKE. In holding both vessels guilty of major faults that contributed to the collision, the trial judge, Walter E. Hoffman, said:

> "We have no difficulty in condemning both vessels under the circumstances of this case." (p. 13a)
>
> "While the RUTH LAKE argues that the FLYING FOAM is solely at fault by reason of the order to go hard right to pass Buoy 2CB to port, we cannot agree that this was the only major fault involved." (p. 16a)
>
> "Equally at fault was the FLYING FOAM with no operative radar and no knowledge as to her whereabouts until 0242 – 4 minutes prior to collision – when she

*Page numbers followed by the letter "a" are references to the corresponding page in the *Appendix* to the *Petition for Writ of Certiorari*.

sighted 2CB 'a mile or so dead ahead' or perhaps only one quarter of a mile as estimated by the lookout. It was at this point that the FLYING FOAM altered her course to starboard in order to pass the buoy to port." (p. 16a)

"However, with respect to the RUTH LAKE and FLYING FOAM, we see no element of closeness. *Both vessels were guilty of major faults.* (Emphasis added.) (p. 17a)

The trial and appellate courts have made factual findings that both vessels were guilty of major faults that contributed to the collision. The petition for *certiorari* is simply another effort to change that factual determination. There are no special or unusual issues of this case to support a favorable consideration of the *Petition for Writ of Certiorari.*

FACTS

A simple, chronological statement of events will demonstrate that this is a classic case of what the courts have declared it to be - a collision resulting from the mutual faults of two vessels.

The RUTH LAKE discharged her pilot at 0203 on May 7, 1967 and headed to sea. After a short time she sighted the white lights of a vessel ahead, about six miles away and two points off her starboard bow. Four to five minutes later the lights were again sighted, at about 3 miles, with the bearing opening, indicating a safe starboard to starboard passage. Shortly thereafter, the aspect of the lights changed and a red light was seen, indicating a course change by the incoming FLYING FOAM. The RUTH LAKE immediately put her rudder to starboard and her engines full astern. Nevertheless, she was caused to collide with the port side of the FLYING FOAM.

The FLYING FOAM was inbound from Puerto Rico. She passed False Cape Buoy at 0136 and set her course at 341° to stay to seaward of Buoy 2CB – about one hour away. At

0215 she came right slightly to 345°, expecting to encounter Buoy 2CB at 0230. When that time arrived and Buoy 2CB had not been sighted, she started her fog signals. At 0232 she slowed from sea speed, 17 knots, to full ahead maneuvering speed, 12 knots. At 0237 the Buoy had not been sighted. She kept apace, but ordered a Radio Direction Finder Fix. Five minutes later, at 0242, she observed Buoy 2CB one mile away and to starboard and abruptly changed course 20° to starboard without giving a signal so that she would pass to seaward of the Buoy and line up in the inbound shipping lane. About 3 minutes later, at 0245, she sighted the RUTH LAKE, ordered her engines full ahead then emergency full ahead. Nevertheless, the collision occurred in about 1 minute, at 0246.

The chronology, along with Exhibits 21* and 22,* clearly show that the outbound RUTH LAKE proceeded so that she would pass Buoy 2CB to port. On two occasions, at six miles and again at three miles, she sighted the lights of the FLYING FOAM off her starboard bow and determined the position of the FLYING FOAM to be such that the two vessels would pass starboard to starboard. Accordingly, no action was required of the RUTH LAKE excpet to hold her course. *City of Albany*, 34 Fed. 812 (1888). Until the red light of the FLYING FOAM was sighted, there was every indication that the vessels would pass each other safely. When the FLYING FOAM changed her course, and came across the outbound shipping lane, it was too late for the RUTH LAKE to avoid her.

In contrast, the FLYING FOAM approached a busy, marine intersection without knowing her position. She was searching for Buoy 2CB. When she did not reach the intersection buoy at the expected time, about 0230, the crew wondered about the visibility and started fog signals. The master ordered a Radio Direction Finder Fix but never got it. Instead, he sighted the buoy visually a little more than a mile ahead and changed his course some 20° to starboard so as to leave the buoy on her port side. Up to this point, the FLYING FOAM had failed to sight the RUTH LAKE – which had sighted her

*See pages 13 & 14

twice. This unexplained failure to see what should have been seen is conclusive evidence of a statutory fault. *New York*, 175 U.S. 187, 204 (1899). The master of the FLYING FOAM realized that he had a defective radar and was without a fathometer and that, "I was coming into restricted waters. By 'restricted' I mean where there's a lot of traffic." However, he failed to take reasonable precautions to avoid collision.

On these facts the District Judge found both vessels guilty of major faults. He condemned the FLYING FOAM for "no operative radar and no knowledge of her whereabouts," for failing to see the RUTH LAKE, for excessive speed, and for failure to sound a whistle signal. The RUTH LAKE was found at fault for an inadequate lookout, excessive speed, and failure properly to use her radar.

This is a classic mutual fault case having no features which would warrant a *writ of certiorari*.

I

The Admiralty Rule of Dividing Damages Equally Between the Two Vessels Found at Fault for a Collision is Eminently Sensible and Should Not be Disturbed.

Collisions between two vessels result from:

A. Inevitable accident.

B. The fault of one vessel – the other being free of fault, or

C. The joint fault of two vessels.

In this case the trial court and the Court of Appeals have found that each of the two vessels was guilty of major faults contributing to the collision. Neither vessel should be permitted to re-argue its case in an effort to mitigate the factual findings of fault.

Petitioner would have this Court set aside the long standing admiralty rule which has equally divided the damages

in such cases where the two vessels have each been guilty of a major fault. Instead, petitioner would place upon the Court the burden of apportioning damages on the basis of some hypothetical percentages. If one vessel is going too fast and another vessel fails to maintain a proper lookout, each one has committed a fault which has substantially contributed to the collision. Who is to say which is the greater fault? It is difficult enough to reproduce at the trial the actual occurrence of a collision with sufficient detail and fidelity to permit the trial judge properly to assess fault. It would be even more difficult to try to assess a percentage of responsibility for a particular fault. Because this is the sensible and practical basis of the divided damage rule, it has been followed by the American Admiralty Courts since 1855. *Schooner Catherine* v. *Dickinson,* 58 U.S. (17 How.) 170, 15 L. Ed. 233 (1855).

There may be reason to deny an equal division of damage when one vessel has been flagrantly negligent and the other vessel has committed only a minor fault. This is the basis of the major-minor fault rule. The experienced trial judge rejected application of the rule in this case, saying:

> "We do not believe that the major-minor fault rule as enunciated in the City of New York, 147 U.S. 72, 85 (1893), can be invoked by either vessel. As indicated by THE VICTORY & THE PLYMOTHIAN, 168 U.S. 410, 414 (1897), the determination of this issue is frequently a close question because subsequent knowledge of what might have prevented disaster tends to quality the inquiry as to the prior duty to avert it. However, with respect to the RUTH LAKE and FLYING FOAM, we see no element of closeness. Both vessels were guilty of major faults." (p. 17a)

If it is found that both vessels are guilty of major faults that contributed to the collision, there is no reason to apply any speculative proportionate damage rule, and this Court has consistently denied *certiorari* in such cases. See:

In re Adams Petition (Melrose - Sandcraft), 237 F. 2d 884, 887 (2 Cir. 1956), cert. den. 352 U.S. 971, 1 L. Ed. 2d 325 (1956).

The A.C. Dodge, 234 F. 2d 374 (2 Cir. 1956), Cert. den. 352 U.S. 928, 1 L. Ed. 2d 163 (1956).

National Bulk Carriers, Inc. v. *United States*, 183 F. 2d 405, 410 (2 Cir. 1950), cert. den. 340 U.S. 865, 95 L. Ed. 631 (1950).

II

There is No Merit in Petitioner's Second and Third Points.

(a)

The FLYING FOAM Should Have Signaled Her Turn.

According to Rule 28, 33 U.S.C. 1090(a), vessels in sight of one another should indicate a course change by giving whistle signals. Even though the FLYING FOAM could have, or in the exercise of reasonable diligence should have, "observed visually" the approaching RUTH LAKE, it is contended in this court that she was not obligated to give the signal required by Rule 28.

The RUTH LAKE lookout observed the FLYING FOAM at a distance of six miles and again at three miles. On the other hand, the lookout of the FLYING FOAM did not see the RUTH LAKE until 2CB was sighted. While the lookout of the RUTH LAKE was effectively carrying out his duties, the lookout on the FLYING FOAM was totally ineffective. He did not sight the RUTH LAKE until she was sighted by the master on the bridge. And when she finally was sighted, the RUTH LAKE was only one-quarter of a mile from the FLYING FOAM. This completely negates the FLYING FOAM's contention that it was not necessary to give a signal of the course change because the RUTH LAKE was not in sight.

(b)

As the Burdened Vessel, the FLYING FOAM was Required to Hold Her Course.

The FLYING FOAM charges the RUTH LAKE with being a burdened vessel in a crossing situation. If the RUTH LAKE was burdened, then the FLYING FOAM was the holding-on vessel and she could not under the rules change her course from 345° to 005°. Rule 21, 33 U.S.C. 1083. When she changed her course without sounding a whistle, she committed a statutory fault. As explained in *Griffin on Collision*, at page 145:

> "Violation by the holding-on vessel of the requirements of Article 21 is, of course, a statutory fault and throws upon her the burden of showing that 'the fault she committed could not have been one of the causes of the collision'." (Citing authorities.)

Furthermore, if a change in course to starboard was required, the RUTH LAKE is condemned for not sounding one blast. *Griffin on Collision* states:

> "If the time has come at which the holding vessel is obliged to act under the note in Article 21, a change of course is certainly then authorized by the rules, and, if to starboard, is to be announced by a signal of one blast." (p. 123.)

In considering the point, the trial judge concluded:

> "We know, of course, that the 'visible distance' rule of 'moderate speed' should not be applied blindly, but where there is knowledge, either actual or constructive, of the presence of other vessels in the vicinity - actual knowledge of the RUTH LAKE and constructive knowledge of the FLYING FOAM - with the limited visibility here shown, the speed may well be immoderate regardless of whether the 'visible distance' test of moderate speed is applicable or not. *Gertrude Parker, Inc.* v. *Abrams*, 178 F. 2d 259, 264 (1 Cir. 1949)." (p. 18a)

III

The Speed of the Vessels Was More a Condition Than a Cause of the Collision.

Although the FLYING FOAM attaches great significance to the speed of the RUTH LAKE, the speed of either vessel is more a condition than a cause of the collision. Both vessels were traveling at substantially the same speed, the FLYING FOAM having continued at full maneuvering speed even after sighting Buoy 2CB. After the course change which brought about the collision, neither vessel could have stopped short of the point of impact.

The efficient cause of the collision was the FLYING FOAM's 20° course change from 345° to 005°; and the course change across a major shipping lane was the result of the FLYING FOAM proceeding rapidly and blindly into an area of heavy traffic without knowledge of her position. Up until the moment the FLYING FOAM altered course, as Exhibit 22* clearly shows, the two vessels were meeting one another in a situation where the RUTH LAKE would cross nearly a mile ahead of the FLYING FOAM. At the closest point, when the two vessels were abeam of each other, they would be some 300 to 400 yards apart. This is what the captain of the RUTH LAKE contemplated from his radar observations; and it is what actually would have happened had it not been for the course change of 0242.

The arguments advanced by the FLYING FOAM are concerned less with the real causes of the collision than with specious interpretations of the law and a convoluted analysis of the facts. This is well illustrated by the contention that a vessel with radar must go slower than one without radar. This is nonsense. The presence of radar may enable a vessel to proceed in weather when a vessel without radar must heave to. All that the Radar Rules (Annex to Rules (2)) mean is that where two vessels are proceeding cautiously, the one with radar may see a situation to which the other is oblivious and thereby take

*See page 14

precautions which the other would not. But to argue that a vessel armed with radar's superior sight must travel slower than one without it, does not make sense.

The major-minor fault doctrine is not applicable, nor would proportionate fault be appropriate, when both vessels are found to have committed major errors that contribute to the collision.

CONCLUSION

The experienced District Judge found that the FLYING FOAM and the RUTH LAKE committed major faults that contributed to the collision. The findings were affirmed *per curiam* by the Fourth Circuit. There is no reason for lifting the decisions with respect to the FLYING FOAM. Her efforts were bent toward finding Buoy 2CB, not other vessels. If she had not changed course, there would have been no collision, and, even under her theory of the case, she was bound under the rules not to make that course change. No reason has been shown to reverse the finding of fault of the District Judge with respect to the FLYING FOAM nor does this case involve any special or important reasons for granting *certiorari*. Accordingly, the petition for *writ of certiorari* should be denied.

Respectfully submitted,

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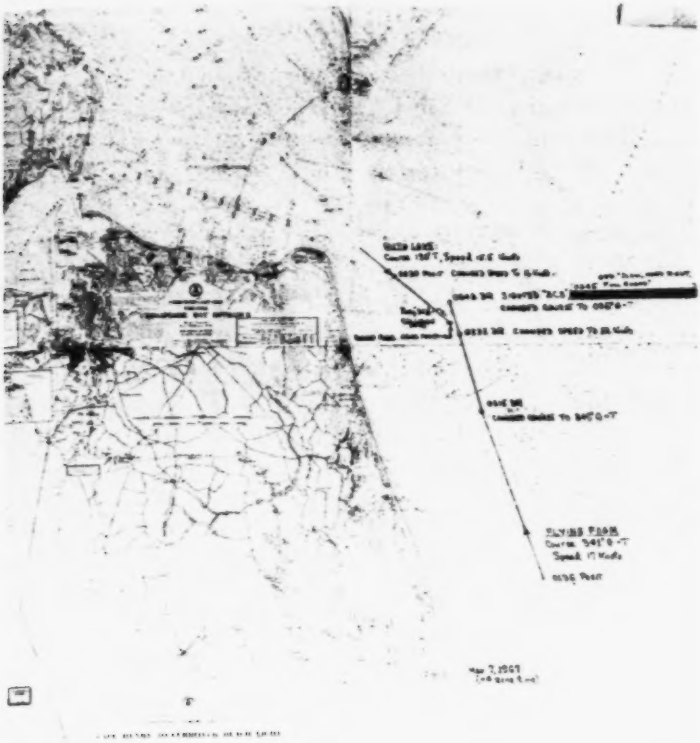

EXHIBIT 21

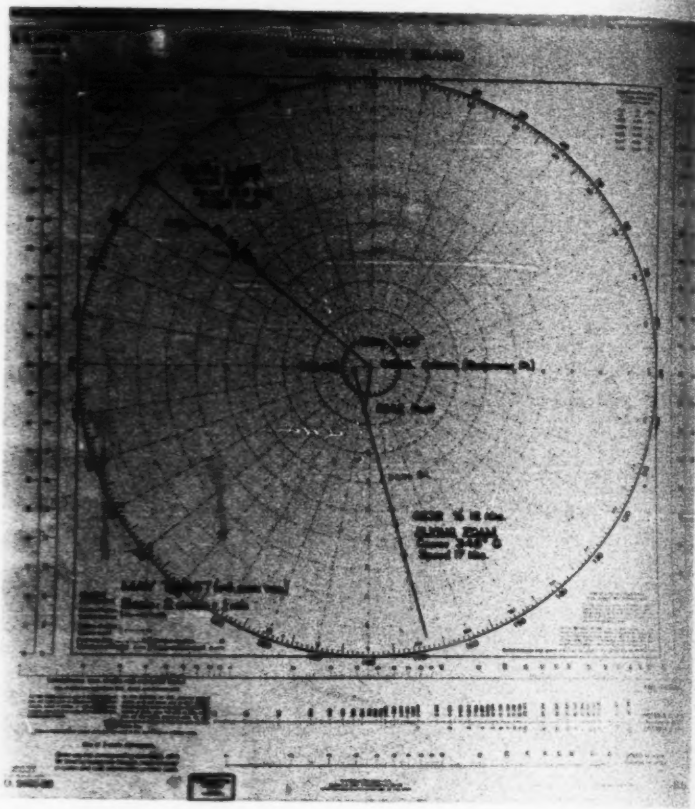

EXHIBIT 22